No. 82-1807

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALBERT SHIELDS, JR., HEIR OF
ALBERT SHIELDS, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether allotments of national forest land under the Alaska Native Allotment Act, as amended, may be made to applicants who did not personally use or occupy the land prior to the establishment of the particular national forest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-9a) is reported at 698 F.2d 987. The opinion of the district court (Supp. App. 4-12) is reported at 504 F. Supp. 1216. The opinion of the Interior Board of Land Appeals denying the allotment application of petitioner Shields, the class representative (Supp. App. 2-3), is reported at 23 I.B.L.A. 188.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1982. A petition for rehearing was denied on February 7, 1983, and an amended opinion was substituted on that date (Pet. App. 1a). The petition for a writ of certiorari was filed on May 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Alaska Native Allotment Act, Act of May 17, 1906, ch. 2469, 34 Stat. 197, as amended by the Act of Aug. 2, 1956, Pub. L. No. 931, 70 Stat. 954, 43 U.S.C. (1970 ed.) 270-1 *et seq.* (repealed 1971) (43 U.S.C. 1617), is set forth at Pet. App. 10a-11a.

STATEMENT

Petitioners are a certified class of Alaska Natives who filed applications for allotments of land located within national forests in Alaska under the Alaska Native Allotment Act, Act of May 17, 1906, ch. 2469, 34 Stat. 197, as amended by the Act of Aug. 2, 1956, Pub. L. No. 931, 70 Stat. 954, 43 U.S.C. (1970 ed.) 270-1 *et seq.* ("Allotment Act"), prior to its repeal in 1971.[1] Section 2 of the Allotment Act, 43 U.S.C. (1970 ed.) 270-2 (emphasis added), permitted such allotments only

> *if founded on occupancy of the land prior to the establishment of the particular forest* or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

The Secretary of the Interior denied petitioners' allotment applications because petitioners could not "establish personal occupancy of [the] land prior to the forest withdrawal." Pet. App. 4a.

Petitioner Shields,[2] as named representative, brought this class action claiming that the statutory requirement that the allotment be "founded on occupancy of the land

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[1]The Allotment Act was repealed by Section 18 of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. 1617. A savings clause preserved applications that were pending on December 18, 1971. *Ibid.*

[2]The original plaintiff, Albert Shields, Sr., died on November 13, 1977, and petitioner Albert Shields, Jr. was substituted as plaintiff. Pet. App. 3a-4a.

prior to the establishment of the particular forest" was satisfied by a showing of Native occupancy prior to the establishment of the forest.[3] The district court rejected this contention. Rather, based on "the administrative and legislative history" (Supp. App. 11), it concluded (*ibid.*)

> that the language "founded upon occupancy of the land prior to the establishment of the particular forest" requires Alaska Natives who seek allotments within a national forest to demonstrate their personal use and occupancy of that land prior to the establishment of the forest.

Accordingly, in view of the undisputed facts (see Pet. 3) that the land for which petitioner Shields had applied had been withdrawn for the Tongass National Forest in 1909 and that Shields' personal use of it had not commenced until 1920, the district court entered summary judgment in favor of respondents (Supp. App. 4-12). The court of appeals affirmed (Pet. App. 2a-9a).

ARGUMENT

The repeal of the Allotment Act in 1971, together with its replacement by comprehensive legislation of substantial benefit to Alaska Natives, has reduced considerably the significance of the question presented by the petition.[4] In

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[3]Petitioners are not contending that they are entitled to the land in question on the alternative ground that it "is chiefly valuable for agricultural or grazing purposes." 43 U.S.C. (1970 ed.) 270-2.

[4]As noted above (note 1, *supra*), Section 18 of ANCSA, 43 U.S.C. 1617, repealed the Allotment Act while preserving allotment applications that were pending on December 18, 1971. Thereafter, the Alaska National Interest Lands Conservation Act ("ANILCA"), 43 U.S.C. (Supp. V) 1634(a)(1), approved the bulk of the "over 7,400" allotment claims that were pending on December 18, 1971. S. Rep. No. 96-413, 96th Cong., 1st Sess. 237 (1979). Although the allotment claims involved in this case are among the limited class of claims that were not legislatively approved by ANILCA (see 43 U.S.C. (Supp. V) 1634(c)),

any event, the decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

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the approximately 200 petitioners in this case constitute the entire class of applicants for allotments of forest lands whose applications were pending on December 18, 1971, and denied because of a failure to establish personal occupancy prior to withdrawal of the forest lands at issue.

Cognizant of the relatively limited direct impact of the decision below (Pet. 14), petitioners attempt to bolster its significance by suggesting (*ibid.*) that the holding may be found persuasive in "a broad range of Native allotment cases in Alaska." Petitioners' concern, however, is entirely speculative. The Natives in *Akootchook* v. *Watt*, No. F-82-4 (D. Alaska filed Jan. 15, 1982), on which petitioners rely (Pet. 14), dispute the government's contention that the prior personal—rather than ancestral—occupancy the courts below held was necessary for an allotment under Section 2 also is required of an applicant for land within a national wildlife refuge under Section 1 (43 U.S.C. (1970 ed.) 270-1), the provision of the Allotment Act involved in that case. See Plaintiffs' Reply to Defendants' Opposition to Motion for Summary Judgment and Plaintiffs' Opposition to Defendants' Cross Motion for Summary Judgment at 3-5 (counsel for petitioners in this case also represents the plaintiff Natives in *Akootchook* v. *Watt*). In any event, since Section 1 of the Allotment Act also was repealed in 1971, even assuming the decision below would control *Akootchook*, only a limited number of additional applicants would be even indirectly affected by it.

Moreover, as noted below (note 6, *infra*), ANCSA represents a comprehensive settlement of claims of Alaska Natives based on aboriginal title. In view of the many substantial benefits Congress conferred in exchange for ANCSA's extinguishment of those claims, petitioners' suggestion (Pet. 14 n.11) that the allotments they seek here "may well represent all that they have in life" surely overstates the significance of this case even to that limited number of allotment applicants who may be affected by it. In the first place, petitioners are seeking the allotments at issue for "seasonal subsistence purposes," not for primary residential use (Record on Appeal, CR 27, Exh. 7; see also Pet. 3). ANCSA's repeal left petitioners with the option of pursuing their allotment claims or seeking patents for up to "160 acres of land occupied by the Native as a primary place of residence on August 31, 1971." 43 U.S.C. (Supp. V) 1613(h)(5) and 43 U.S.C. 1617(a); see also 43 U.S.C. (Supp. V) 1613(c)(1) (providing for conveyance of surface estate in tracts occupied as a primary place of residence, primary place of business, subsistence

1. As with any case involving the construction of a statute, the objective "is to ascertain the congressional intent and give effect to the legislative will." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975). Even if, as the court of appeals concluded (Pet. App. 8a), "the language of the [Allotment Act] is not conclusive" concerning whether an allotment applicant must prove personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest, the legislative history demonstrates unequivocally Congress's intent that only personal use would satisfy the "founded on occupancy" requirement of 43 U.S.C. (1970 ed.) 270-2. The Senate Report that accompanied the 1956 Amendments, by which Sections 2 and 3, 43 U.S.C. (1970 ed.) 270-2 and 270-3, were added to the Allotment Act, stated the requirement of personal occupancy unambiguously (S. Rep. No. 2696, 84th Cong., 2d Sess. 1 (1956) (emphasis added)):

> Allotments may be made in national forests if the land is chiefly valuable for agricultur[al] or grazing purposes, or if *the native* had occupied the land prior to the establishment of the forest.

In any event, we do not agree that the language and structure of the Allotment Act "do[] not aid [the] search for congressional intent" (Pet. App. 5a). It is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act." *Richards* v. *United States*, 369

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campsite or headquarters for reindeer husbandry). Significantly, Congress recently has sought to protect the seasonal subsistence use of public lands by Alaska Natives through public management of the land, rather than by transferring ownership to individual Alaskans. See Title VIII of ANILCA, 16 U.S.C. (Supp. V) 3111-3126. ANCSA also provides substantial benefits to Alaska Natives through their ownership of stock in the Regional and Village Corporations organized pursuant to the statute. See generally *Doyon, Ltd.* v. *Bristol Bay Native Corp.*, 569 F.2d 491 (9th Cir. 1978); *Okpeagvik Inupiat Corp.* v. *Arctic Slope Regional Corp.*, 517 F. Supp. 1255 (D. Alaska 1981).

U.S. 1, 11 (1962) (footnote omitted). Accordingly, " '[i]n expounding a statute, [this Court is not] guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy.' " *Philbrook* v. *Glodgett, supra*, 421 U.S. at 713, quoting *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849). When Section 2 of the Allotment Act, 43 U.S.C. (1970 ed.) 270-2, is properly viewed in the context of the Act as a whole, it is clear that its "founded on occupancy" requirement is a requirement of personal, rather than ancestral, use.

Not only Section 2, but each of the three sections of the amended Allotment Act, 43 U.S.C. (1970 ed.) 270-1 to 270-3, contains a requirement based on occupancy (see Pet. App. 10a-11a). Section 1, 43 U.S.C. (1970 ed.) 270-1, which affords a qualified Indian, Aleut or Eskimo a preference right to secure by allotment up to 160 acres of nonmineral land occupied *by him*, on its face requires personal occupancy by the Native applicant, and petitioners have never contended otherwise. Moreover, in the court of appeals petitioners conceded (Brief for Appellant at 9) that the requirement in Section 3, 43 U.S.C. (1970 ed.) 270-3, of proof of "substantially continuous use and occupancy of the land for a period of five years" "plainly stated" a "requirement of personal occupancy."[5] The burden of petitioner's argument is that, in Section 2, notwithstanding the

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[5]In the court of appeals, petitioners argued that unless Section 2 were construed to require only ancestral occupancy, Section 3's additional requirement of five years' use and occupancy would be rendered superfluous. The court of appeals correctly rejected this argument on the ground that the Section 3 five-year occupancy requirement applies to Section 1, which authorizes allotments from any public lands, as well as to Section 2, which authorizes allotments from national forest lands under certain conditions. Thus, the court of appeals concluded (Pet. App. 5a), "the personal occupancy requirement of [S]ection 3 has

similarity of the language employed therein—"occupancy of the land prior to the establishment of the particular forest"—Congress intended the entirely different concept of "traditional" or "ancestral" occupancy by Alaska natives.[6] But neither the statutory language nor the legislative history of the 1956 Amendments signals any intent by Congress to effect so dramatic a shift in meaning within the context of a single statute.

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meaning as applied to [S]ection 1 allotments, regardless of the interpretation of [S]ection 2." Similarly, Section 3's five-year occupancy requirement applies to allotments under Section 2 of land that "is chiefly valuable for agricultural or grazing purposes." We add that the combined requirements of Sections 2 and 3 served to assure that forest land allotments were granted only where an Alaska Native's use and occupancy not only antedated the land's inclusion in the national forest, but also continued for at least five years before the allotment was made.

[6]Although petitioners emphasize (Pet. i, 3) Shields' relatively intimate connection to the land in question, both in terms of his own use and his relationship to those who used the land prior to its withdrawal for the Tongass National Forest, petitioners' argument plainly applies as well to persons whose connection with the land they seek is far more attenuated than Shields'. Petitioners thus contend that allotments under Section 2 may be based on "an unbroken chain of *Native* use and occupancy." Pet. 4 (emphasis added); see also id. at 8 ("ancestral[] occupancy"); Brief for Appellant in the court of appeals at 7 ("continuous occupancy by *a* Native or Natives since a time prior to the applicable land withdrawal" (emphasis added)); *id.* at 7-8 ("traditional native occupancy rather than the occupancy of a specific applicant" (footnote omitted)).

In one of the administrative decisions denying the allotment applications of the petitioner class, the occupancy concept urged by petitioners was therefore correctly denominated "aboriginal occupancy." *Louis P. Simpson*, 20 I.B.L.A. 387, 398, 400 (1975) (Thompson, Administrative Judge, concurring). Section 4 of ANCSA, 43 U.S.C. 1603, however, extinguished all claims to land in Alaska based on aboriginal use and occupancy. See *United States* v. *Atlantic Richfield Co.*, 612 F.2d 1132, 1134-1138 (9th Cir.), cert. denied, 449 U.S. 888 (1980). To be sure, ANCSA expressly provided for the preservation of the Allotment Act claims that are at issue here (see note 1, *supra*). Nevertheless, Congress's intent that Section 4 of ANCSA "be broadly construed to eliminate [*all* aboriginal claims and *all* aboriginal land titles] as any basis for any form

2. Petitioners nevertheless urge (Pet. 9-12) that the decision below conflicts with the many cases in which this Court has held that the contemporaneous administrative construction of an otherwise ambiguous statute is entitled to substantial deference by a reviewing court. Specifically, petitioners contend (Pet. 9, quoting Pet. App. 7a) that the court of appeals erred in "refus[ing] to defer" to one pre-Amendment and two post-Amendment decisions in which the Secretary granted allotments apparently without requiring personal occupancy because, the court found, those decisions " 'were unpublished and of little precedential value.' " [7] As we showed above (pages 5-7, *supra*), however, Section 2's "founded on occupancy" requirement, when properly viewed in the context of the Allotment Act as a whole, is not ambiguous. Moreover, the visibility of the decisions on which petitioners rely—as well as the extent to

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of direct or indirect challenge to land in Alaska" (H.R. Conf. Rep. No. 92-746, 92d Cong., 1st Sess. 40 (1971) (emphasis in original)) is additional support for the refusal of the courts below to adopt petitioners' theory of "traditional native occupancy."

Indeed, petitioner Shields' tribe already has recovered more than $7.5 million for the government's taking of its aboriginal title to much of southeastern Alaska. *Tlingit & Haida Indians of Alaska* v. *United States*, 389 F.2d 778, 791 (Ct. Cl. 1968). That judgment included compensation for "14,956,312 acres in Tongass National Forest taken by Executive Proclamations" (*id.* at 781), including that of February 16, 1909 (*id.* at 782), by which the land sought by petitioners was withdrawn (see Pet. 3). See also *Tlingit & Haida Indians of Alaska* v. *United States*, 177 F. Supp. 452, 467-468 (Ct. Cl. 1959).

[7] Both courts below accepted petitioners' premise (Pet. 7) that these three allotment decisions recognized ancestral rather than personal occupancy as the basis for an allotment of forest lands under Section 2. See Pet. App. 7a; Supp. App. 10. For present purposes, we must also. We note, nevertheless, that the Department declined to accept the cases as precedent in part because that was not the clear basis for the decisions. *Louis P. Simpson*, 41 I.B.L.A. 229 (1975) (on Petition for Reconsideration). The IBLA further observed (*ibid.*) that the decisions "cannot bind the Department to perpetuate error."

which they represent a settled administrative practice—has particular significance to the question of statutory construction involved in this case since the 1956 Amendments were specifically intended to

> safeguard[] the national forests *by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest*, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

H.R. Rep. No. 2534, 84th Cong., 2d Sess. 2 (1956) (emphasis added). Both courts below therefore properly examined the pre-1956 history of departmental regulations and decisionmaking and correctly concluded that Congress intended to require personal occupancy of the land sought prior to its withdrawal for the national forest as a prerequisite of allotment.

As the court of appeals noted (Pet. App. 6a), Interior's earliest regulations implementing the 1906 Allotment Act required that allotments within the national forests be "founded on *actual* occupancy prior to the establishment of the forest." See, *e.g.*, 51 Pub. Lands Dec. 145-146 (1925); 50 Pub. Lands Dec. 27, 48 (1923); 48 Pub. Lands Dec. 70, 71 (1921); 45 Pub. Lands Dec. 227, 246 (1916) (emphasis added). In context, the use of the word "actual" strongly suggests that occupancy by the applicant himself was required. Moreover, the same "actual occupancy" language was used to describe the requirement for an applicant's "preference right" to land "occupied by him" (Alaska Native Allotment Act, Act of May 17, 1906, ch. 2469, 34 Stat. 197), which, as we noted above (page 6, *supra*), plainly

stated a requirement of personal occupancy by the Native. See 50 Pub. Lands Dec. 27, 50 (1923); 48 Pub. Lands Dec. 70, 73 (1921).[8]

In 1935, the Department deleted the word "actual" from its regulations in favor of the "founded on occupancy" terminology (55 Pub. Lands Dec. 282, 283) that was used consistently in subsequent regulations (see, *e.g.*, 43 C.F.R. 67.7 (1955)) and ultimately incorporated in the Allotment Act by the 1956 Amendments. Neither court below regarded this change as one of substance, however, and petitioners have never relied on it as indicating an administrative intent to alter the requirements for allotment from personal to ancestry occupancy.

Rather, petitioners rely on *Jack Gamble*, Anchorage 017456 (Aug. 10, 1951), in which the Department apparently granted an allotment in the absence of proof that the applicant personally had occupied the land prior to the establishment of the national forest. In view, however, of the longstanding published administrative interpretation to the contrary—the only administrative construction of which Congress could have been aware when it stated its intent in 1956 (H.R. Rep. No. 2534, *supra*, at 2) to "enact[] into law the substance of present [Interior Department] regulations * * *"—petitioners' reliance (Pet. 7) on a single unpublished pre-Amendment decision is seriously misplaced. See

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[8]Furthermore, since 1921 the Department's published decisions made clear, albeit in dictum, that it was the Native's personal occupancy of the land in question prior to its withdrawal for national forest purposes that entitled him to an allotment of it. See *Frank St. Clair*, 52 Pub. Lands Dec. 597, 598 (1929) ("[t]he Indian's alleged occupancy being prior to the establishment of the forest, he had a preference right to an allotment not affected by the withdrawal"); *Yakutat & Southern Ry.* v. *Setuck Harry, Heir of Setuck Jim*, 48 Pub. Lands Dec. 362, 364 (1921) ("[t]he land applied for was occupied by the Indian prior to the forest reservation, and owing to his continuous use, it appears that he is entitled to a preference right as granted by the statute").

Watt v. *Western Nuclear, Inc.*, No. 81-1686 (June 6, 1983), slip op. 9-10 & n.7.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1983

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[9]To whatever extent petitioners continue to rely on *Charles G. Benson*, Juneau 011549 (Aug. 24, 1961), and *John Littlefield*, Anchorage 133471 (Apr. 28, 1961), that reliance also is misplaced. As petitioners themselves acknowledge (Pet. 9 n.8; emphasis added), it is the pre-Amendment administrative practice that is relevant to this case "because Congress expressly intended to enact the substance of *existing* administrative regulations."

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